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Ganesan a/l Subramaniam v Public Prosecutor

B HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 42(K)-46–06 OF 2015
MOHAMAD SHARIFF JC
18 MARCH 2016

C *Criminal Procedure — Acquittal or discharge — Discharge not amounting to acquittal — Whether order appropriate — Attorney General's Chambers accepted accused's representation that cheating charge against him be withdrawn — Prosecuting officer without giving reasons asked sessions court to order discharge not amounting to acquittal — Prosecution undecided whether or not it wanted to* D *continue prosecuting case — Whether circumstances of case warranted an acquittal and discharge*

The instant appeal was against the decision of the sessions court in ordering the E appellant to be discharged without an acquittal ('DNAA') on a charge of cheating under s 420 of the Penal Code. The appellant contended that the subject-matter of the charge was a contractual matter and that after the complainant in the criminal case had settled the matter with him and withdrawn his police report, he ('the accused') wrote a letter of representation F to the Attorney General's Chambers ('AGC') for the cheating charge to be withdrawn. At the sessions court, the prosecuting officer after informing the court that the AGC had accepted the accused's representation, asked for an order of DNAA to be made. The sessions court judge took the view that even though the complainant was not interested in proceeding with the trial, the G court could not usurp the power of the public prosecutor and order that the appellant to be given a discharge amounting to an acquittal.

Held, allowing the appeal and acquitting and discharging the appellant of the criminal charge:

H (1) There was justification for the sessions court to have issued an order of discharge amounting to an acquittal in the circumstances of the case when: (a) there were no specific grounds or reasons or indication from the prosecution that it was not pursuing with the matter further; (b) the prosecution failed to give any good grounds for applying for a DNAA; (c) I there was nothing to show the prosecution was able to proceed for the time being or within a reasonable time; (d) it was unlikely the case could have been prosecuted expeditiously in the short future; and (e) it was not right to leave an individual for an indefinite period with a groundless charge hanging over him (see para 23).

(2) There were special reasons and valid grounds for a discharge and acquittal order. The case was left hanging over the appellant's mind for quite some time and there was no evidence the prosecution had decided to prosecute the case within a reasonable time (see para 24).

[Bahasa Malaysia summary

Rayuan ini adalah terhadap keputusan mahkamah sesyen dalam memerintah perayu pelepasan tanpa pembebasan ('PTP') atas tuduhan penipuan di bawah s 420 Kanun Keseksaan. Perayu berhujah bahawa perkara tuduhan adalah perkara kontraktual dan bahawa selepas pengadu dalam kes jenayah telah selesaikan perkara dengannya dan menarik balik laporan polis, dia ('tertuduh') menulis surat representasi kepada Jabatan Peguam Negara ('JPN') bagi tuduhan penipuan ditarik balik. Di mahkamah sesyen, pegawai pendakwaan selepas memberitahu mahkamah bahawa JPN menerima representasi tertuduh, memohon untuk perintah PTP dibuat. Hakim mahkamah sesyen berpendapat bahawa walaupun pengadu tidak berminat dengan perbicaraan, mahkamah tidak dapat merampas kuasa pihak pendakwaan dan memerintah bahawa perayu diberikan pelepasan yang merupakan kepada pembebasan.

Diputuskan, membenarkan rayuan dan melepaskan dan membebaskan perayu daripada tuduhan jenayah:

(1) Terdapat justifikasi bagi mahkamah sesyen mengeluarkan perintah pelepasan dalam keadaan kes apabila: (a) tidak terdapat alasan spesifik atau alasan atau petunjuk daripada pihak pendakwaan bahawa ia tidak mengikuti dengan perkara tersebut selanjutnya; (b) pihak pendakwaan gagal untuk memberi apa-apa alasan baik untuk memohon PTP; (c) tidak terdapat apa-apa untuk menunjukkan pihak pendakwaan dapat meneruskan buat masa ini atau dalam masa yang munasabah; (d) tidak mungkin kes boleh didakwa dengan segera dalam masa singkat; dan (e) adalah tidak betul untuk membiarkan individu bagi tempoh tak tentu dengan tuduhan yang tak berasas bergantung ke atasnya (lihat perenggan 23).

(2) Terdapat alasan khusus dan alasan sah bagi perintah pelepasan dan pembebasan. Kes dibiarkan tergantung atas minda perayu untuk beberapa seketika dan tidak terdapat keterangan pihak pendakwaan telah memutuskan untuk mendakwa kes tersebut dalam masa yang munasabah (lihat perenggan 24).]

Notes

For cases on discharge not amounting to acquittal, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 122–140.

Cases referred to

Choo Yoke Choy v PP [1992] 2 MLJ 632, SC (refd)
Datuk (Datu) Amir Kahar bin Tun Haji Mustapha v Tun Mohd Said bin Keruak & Ors [1994] 3 MLJ 737, HC (refd)
Koh Teck Chai v PP [1968] 1 MLJ 166 (refd)
Kuppusamy v PP [1948] 1 MLJ 25 (refd)
Long bin Samat & Ors v PP [1974] 2 MLJ 152, FC (refd)
PP v Lau Ngiik Yin [2007] MLJU 668, HC (refd)
PP v Mat Zain [1948-1949] supp MLJ 142 (refd)
PP v Suppiah Pather Penang Criminal Revision No 14 of 1951 (unreported) (refd)
PP v Syed Abdul Bahari Shahabuddin [1976] 1 MLJ 87 (refd)
PP v Zainuddin & Anor [1986] 2 MLJ 100, SC (refd)
Tai Chai Keh v PP [1948-1949] supp MLJ 105b, CA (refd)
Tan Ah Chan v Regina [1955] 1 MLJ 218 (refd)

Legislation referred to

Criminal Procedure Code ss 254, 376
Federal Constitution art 145(3)
Laws of the Constitution of Sabah

Kumarendran (Kumar & Co) for the appellant.
Noor Svetlana bt Mohd Noor Nordin (Wan Shahida with her) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Mohamad Shariff JC:

BACKGROUND

[1] This is an appeal by the appellant against the decision of the learned sessions court judge who had ordered a discharge not amounting to an acquittal under s 254 of the Criminal Procedure Code. The decision was delivered and pronounced on 25 May 2015. Hence the appellant appeal against the said decision and the appellant should be acquitted and discharge. Before I proceed to decide on this matter, lets look at the charges that was preferred against the appellant. The charges are as follows:

> Bahawa kamu pada 11.4.2011 di TM Selvam Trading, Lot 284 Jalan Tiga Off, Jalan Chan Sow Lin di daerah Cheras, Wilayah Persekutuan, Kuala Lumpur telah menipu Armin Iskandar bin Abdullah No KP: 721125–08–6259, untuk mempercayai bahawa kamu boleh membekalkan serta merta 10,000 Tan Metrik 'Iron Ore Magnetite' – Gred Minima 62 peratus daripada lombong milik syarikat kamu iaitu Glory Iron Mining Sdn Bhd. Di Lot 27671 kawasan Sungai Gamoh Mukim Keratong Rompin Pahang dengan curangnya telah mendorong Armin Iskandar bin Abdullah menyerahkan wang deposit menerusi cek Public Bank No 038338 Syarikat Arrow Multimode bernilai RM1,000,000 atas nama Tamil

Chelvam a/l M Ramasamy kepada kamu padahal kamu tahu kamu tidak boleh membekalkan 'Iron Ore Magnetite' – Gred Minima 62 Peratus yang diminta, yang mana Armin Iskandar bin Abdullah tidak akan berbuat demikian sekiranya tidak diperdayakan oleh kamu, dan dengan ini kamu telah melakukan kesalahan yang boleh dihukum dibawah Seksyen 420 Kanun Keseksaan.

Hukuman

Sabit kesalahan kamu boleh dipenjara selama tempoh tidak kurang daripada satu tahun dan tidak lebih dari sepuluh tahun dan dengan sebat dan boleh juga dikenakan denda yang boleh sampai dua tahun, atau dengan denda, atau dengan kedua-duanya.

[2] With the facts clarified, what is left is the legal issue at hand. The central crux and issue of this appeal is whether an order of discharge amounting to acquittal ('DNA') should be given by the learned sessions court judge based on the fact that the incident arisen from a contract and is of civil nature. This fact was accepted by the deputy public prosecutor. Evidence also shown that there was also another settlement negotiation between the complainant and the accused/appellant, whereby a settlement was made, and this resulted in the complainant withdrawing his police report: Salak South No: 22/13/13 dated 13 May 2015 that was made on the 15 March 2013 by one Armin Iskandar Abdullah. Having regards the withdrawal of such report, a letter of representation was written on behalf of the accused/appellant to the Attorney General's Chambers. It was clearly stated in that letter of representation that the charges were to be withdrawn against the accused/appellant. What matters most was it was recorded in court that such letter of representation was received by the prosecution and was accepted. Having had the facts in mind and within the purview of the prosecution, learned counsel for the appellant had submitted that in this circumstances the appellant should be discharge amounting to an acquittal (DNA) nevertheless it was turned down by the learned session judge who only ordered a discharge not amounting to an acquittal ('DNAA').

BRIEF FACT

[3] At p 10 of the appeal record, the learned session court judge had narrated the scenario of the proceeding. Having perused the notes of proceeding at pp 17–23 of the appeal record, I concluded as such. On 18 February 2015, the appellant was charged with one charge above. The charge was first read to the appellant and being explained and the appellant had claimed trial for the charge. On 28 April 2015, it revealed that there were some developments pertaining to the case between the appellant and the complainant and only then the DPP had on 14 May 2015, officially informed the court that the complainant had wanted to withdrew the report. On 25 May 2015, the DPP had informed the court that the AG's Chambers had received

the representation from counsel and the representation was accepted. Later the DPP had requested for an order of DNAA.

THE COUNSEL AND THE RESPONDENT'S SUBMISSION

[4] The crux of learned counsel arguments was that it clearly shows that the complainant acknowledges it is a civil in nature. In view of that the complainant on his own accord had withdrew the police report. In support, the investigating officer of the case had taken a statement from the complainant confirming that he has withdrawn the police report. Having pursue such matter, a letter of representation was made by the appellant's counsel in that such complaint was one of civil in nature and the case should be withdrawn. Such representation was accepted by the AG's Chambers. Learned counsel argued that the learned session judge was evidently misconstrued when said 'the courts have limited rights to grant DNAA, much less an acquittal'. Further more, the complainant in this matter was no longer interested in pursuing with this matter. Learned counsel for the appellant had submitted that without the presence or the evidence of the complainant, is was impossible for the respondent to proceed on with the trial vis a vis no evidence at all against the appellant. Furthermore the DPP in no certainly to proceed with the case.

[5] The learned DPP on the other hand had submitted that though the complainant was not interested to proceed on with his complaint and had withdrew the police report, nevertheless there were some other evidence. The learned DPP has yet to seek for instruction. Having asked by the court, the DPP is not very sure to proceed with the case, nevertheless maintain an order of discharge not amounting to an acquittal (DNAA).

DECISION OF THE SESSIONS COURT JUDGE

[6] The gist of the decision of the learned sessions court judge are as follows:

(a) art 145(3) of the Federal Constitution states that it is the power of the attorney general being a public prosecutor has the power to institute, conduct or discontinue any proceeding for an offence other than proceedings before the Syariah Court, a Native Court or a Court Martial; and

(b) with respect to s 376 of the Criminal Procedure Code, the attorney general shall be the public prosecutor and shall have control and direction of all criminal prosecution and proceedings but the court would in no position to ursurp the power of the prosecution, more so to order an acquittal. As such an appropriate order should be the discharge not amounting to an acquittal (DNAA).

FINDING AND DECISION

[7] This court had the proviledged of having read the notes of proceeding, the grounds of judgment of the learned sessions court judge, the appeal record and the submission of both parties and the authorities cited therein.

[8] Before going to the merit of the facts, it is best to state that the Federal Constitution which is the supreme law of this land, and of which, statutory law must yield to, is enshrined in art 145(3) of the Federal Constitution and reproduced below:

> The Attorney General shall have power, exercisable at his discreation, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Muslim court, a Native Court or a Court Martial.

[9] In *Long bin Samat & Ors v Public Prosecutor* [1974] 2 MLJ 152, Lord Suffian LP had occasion to say when touching on this article at p 158 para A (right):

> In our view, this clause from the supreme law clearly gives the attorney general very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does wish to institute or to go with any criminal proceedings which he has decided to discontinue.

[10] Having read the above provision, and together with s 376 of the Criminal Procedure Code, the attorney general being the public prosecutor shall have full control and direction of all criminal prosecution and proceedings under the Code. The learned sessions judges who are partners in the machinery of justice are similarly clothed with the relevant power and authority for purposes of carrying out her duties. For the conduct of criminal cases, the learned sessions judge observes the procedures laid down in the Criminal Procedure Code.

[11] I wish to state that in arriving at my findings, I have entirely agreed with the learned deputy public prosecutor and the learned sessions court judge in that it is settle law that the power of the prosecution will always lies on the public prosecutor. Though the complainant was not interested to pursue with the trial or proceeding, the court would not usurp the power of the public prosecutor and discharge the appellant amounting to an acquittal (DNA). Neither the complainant is vested such power, as the power to discontinue will always lies on the public prosecutor and none others. As such, it was absurd to think that the learned sessions judge could brush aside the constitutional powers of the attorney general.

[12] Without going overboard, it is trite law that the provisions of the constitution hold sway over any other laws (see: *Datuk (Datu) Amir Kahar bin Tun Haji Mustapha v Tun Mohd Said bin Keruak & Ors* [1994] 3 MLJ 737 where even constitutional conventions could not override the express provisions of the Sabah Constitution). NS Bindra in *The Interpretation of Statutes* in no uncertain terms said:

> The Constitution is the very framework of the body policy: its life and soul; it is the fountain-head of all its authority, the main spring of all its strength and power. The Executive, the Legislature and the Judiciary are all its creation, and derive their sustenance from it ... While the constitution is the direct mandate of the people themselves, the statute is an expression of the will of the Legislature only, though the Legislature is also the representative of the people. A Constitution is but a higher form of statutory law ...
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> A written Constitution is to interpreted and effect given to it as a paramount law to which all other laws must yield.

[13] Due to the possible overlapping and inter encroachments of the jurisdiction by the Judiciary and the prosecution and due to this misunderstanding leading to incursions into each others territory, two views have mushroomed, namely:

(a) unless there are good grounds to the contrary, the discharge of an accused person should amount to an acquittal (see *Public Prosecutor v Suppiah Pather* Penang Criminal Revision No 14 of 1951 (unreported), *Public Prosecutor v Mat Zain* [1948-1949] supp MLJ 142, *Tan Ah Chan v Regina* [1955] 1 MLJ 218, *Tai Chai Keh v Public Prosecutor* [1948-1949] supp MLJ 105b and *Choo Yoke Choy v Public Prosecutor* [1992] 2 MLJ 632; and

(b) the other being that the discharge should not amount to an acquittal if the complainant is not interested as informed by the prosecutor so long as he is still interested in prosecuting the accused.

[14] As regards to (a) above, it is now established that an acquittal can only follow if the prosecution does not desire to pursue the matter further (see *Public Prosecutor v Syed Abdul Bahari Shahabuddin* [1976] 1 MLJ 87, *Koh Teck Chai v Public Prosecutor* [1968] 1 MLJ 166 and *Kuppusamy v Public Prosecutor*. As for (b), the above statement seemed to be the current established law. Therefore, when the complainant is not interested, without the latter hinting that the charge is groundless or is disinterested in pursuing the case further, the application should be allowed. In this scenario an order of discharge not amounting to an acquittal should be appropriate.

[15] In the case of *Public Prosecutor v Zainuddin & Anor* [1986] 2 MLJ 100, the court stated that:

> The question which we have to answer here was whether a magistrate holding a summary trial could acquit and discharge the accused without hearing the evidence for the prosecution at all ...
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> Until the decision of Mohamed Azmi J (as he then was) in *Public Prosecutor v Mohamed Said* [1984] 1 MLJ 50 it was generally considered as settled law that the magistrate had no such powers. Murray-Aynsley J in *Kuppusamy v Public Prosecutor* [1948] 1 MLJ 25 held that the earlier stage at which a magistrate can acquit an accused person is after hearing all the evidence for the prosecution. This ruling was accepted and followed by Ong Hock Sim J in *Public Prosecutor v Goh Kee Chuan* [1967] 1 MLJ 174 and *Public Prosecutor v Mahmud* [1974] 1 MLJ 85. This view was accepted by the Federal Court, whoe judgment was delivered by Ong J in *Chu Chee Peng v Public Prosecutor* [1973] 2 MLJ 35 ...
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> In *Chu Chee Peng*'s case the court was clearly of the view that a magistrate could not order an acquittal of the accused without hearing all the evidence which could be material to the prosecution case and that any discharge ordered by the magistrate without hearing such evidence could not amount to an acquittal and therefore could not be set up as a defence of *autrefois acquit* should the accused be subsequently re-charged for the same offence. The court in no uncertain terms said that there were two circumstances in which a magistrate could order an acquittal:
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> (1) When after all the evidence has been heard no case has been made out to support the charge, the acquittal is mandatory at the end of the prosecution (section 173(f));
>
> (2) When because the main prop of the prosecutioncase has prematurely collapsed and further proceeding would be an exercise in futility, the prosecution may in its discretion offer no further evidence (section 254).
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> Any discharge of the accused other than in these two circumstances, such as a discharge because the charge is considered to be groundless, or because the application for postponement by the prosecution was turned down and the prosecution unableto proceed should only be a discharge not amounting to an acquittal.

[16] Having said this, to my mind, to pronounce an order of discharge amounting to an acquittal, or discharge not amounting to an acquittal which is not in accordance with the requirements of the law, would tentamount to an ultra vires the Constitution and the Code.

[17] Be that as it may, on the reversed side of the case above, this court had the priviledged of referring to the case of *Koh Teck Chai v Public Prosecutor* [1968] 1 MLJ 166 as submitted by learned counsel:

> ... the power enabling the discharge of the accused person without acquitting him is a power which should be *exercised sparingly and grudgingly* and only where the court is satisfied for good cause shown that the *public interest insistently demands that it be used*. Our courts have consistently adopted the line that *unless some very good ground is shown it would not be right to leave an individual for an indefinite period with a charge* hanging over him. In the circumstances of this case of the learned

magistrate should be varied so that the discharge should amount to an acquittal ...

Based on the above authority, it is my finding that the learned session court judge had misconstrued himself by saying that he had limited rights and power to grant a full acquittal when in facts is otherwise.

[18] In another case of *Public Prosecutor v Syed Abdul Bahari Shahabuddin* [1976] 1 MLJ 87, Ong Hock Sim J (as he then was) stated that:

> ... sub-s (iii) of Section 254 specifically enacts that a discharge under that section shall not amount to an acquittal unless the court so directs. *It is settled law that unless there are good grounds to the contrary, a discharge under this provision should amount to an acquittal.* Good grounds for a discharge not amounting to an acquittal would arise where the prosecution is unable to proceed for the time being but can satisfy the court that the temporary impediment is not unsurmountable and that it proceed within a reasonable time. This seems to be the *raison d'etre* for the scheme providing for a discharge not amounting an acquittal ...

CURRENT CASE SCENARIO

[19] Under s 254 of the Criminal Procedure Code, at any stage of the trial, before the delivery of any judgment, the public prosecutor may inform the court that he will not further prosecute the charge and thereupon the accused shall be acquitted. In other word there is no necessity for the learned sessions judge to consider further as to the viability of the charge but merely to acquit and discharge the accused after being informed. Under this provision such discharge shall not amount to an acquittal unless the court so directs. In other words, for him to be recorded to have been acquitted, it must be pursuant to the pro-active act of the learned sessions judge who must so specify the details. Notwithstanding this supposed room given to the learned sessions judge, it is quite established that whenever the prosecution has indicated to the court that it is not interested in pursuing the matter, the court then shall acquit the accused.

[20] Reverting to the present appeal, it is not disputed that the DPP had informed the court that the complainant wishes to withdrew his report. From the record of proceedings, when the deputy public prosecutor applied for an order of discharge not amounting to an acquittal (DNAA), he had failed to give to the courts any good reasons or grounds for having the order of DNAA. No other details had the DPP informed the court. Never did the learned DPP at any time had inform the court below that the representation by learned counsel was accepted by the AG's Chambers which clearly reflect such cases was civil in nature. The learned deputy public prosecutor did not even indicated to the court of their intention either to pursue the case or otherwise against the appellant in due course. Such reflection had shown that the prosecution was not interested in pursuing the case at any time. To my mind these reflect their

seriousness not to proceed on with the trial, if any.

[21] I am quite disagreeable with the learned deputy on the issue of either the prosecution wanted to pursue the charge against the appellant and if so, when should they decided to do so? It is unjustifiable to question such power and prerogatives, nevertheless there are no certainties at all by the prosecution. In my mind, it is best to refer to the case of *Public Prosecutor v Lau Ngiik Yin* [2007] MLJU 668, it was stated that:

> ... in my view the court must order an acquittal and not DNAA, *when the prosecutor has shown disinterestedness in prosecuting the case or the prosecution is not able to prosecute the case for good reasons and it is unlikely the case can be prosecuted expeditiously in the short future*. This is so because the liberty of His Majesty's subject cannot be placed by a continuous threat by the prosecution by only an order of discharge. *Such an order may be against constitutional guarantees* ...

[22] Pursuing the law further, with the learned sessions judge being subservient to the superior constitutional power of the attorney general with regard to its inability to discharge an accused person amounting to an acquittal, compounded by all the above discussed reasons, a legal issue worth considering is whether the learned sessions judge has the inherent powers to do so. At the outset the answer is in the negative. Nevertheless to say that the decision and powers of the public prosecutor is immutable and cannot be question by the court is a proposition unsustainable under the Federal Constitution. To quote such words of a judge in the above case as follow:

> ... this court is the Supreme Arbiter of what is, right and wrong. Any public decision maker is always subject to judicial scrutiny. Ordinarily a challenge on the decision of any public decision maker is done by way of proper application within the concept of judicial review. That does not necessarily mean that the court has no powers or jurisdiction at any time to exercise its prerogative powers, when justice demands ... such prerogative powers will only be exercised in extreme situation either when it is necessary and essential to protect and safeguard the Federal Constitution and/or where the spirit and intent of the Federal Constitution is violently breached by the public decision maker ...

[23] To conclude on the matter at hand, there was justification for the learned sessions judge to issue an order of discharge amounting to an acquittal, in the circumstances of the case when:

(a) there was no specific grounds or reasons or indication propounded by the prosecution that they are not pursuing the matter further;

(b) the prosecution having applied for an order of DNAA, had failed to give any good grounds for having the order of DNAA;

(c) there was nothing to show that the prosecution is able to proceed for the time being or proceed within a reasonable time;

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(d) it is unlikely that the case can be prosecuted expeditiously in the short future;

(e) it would not be right to leave an individual for an indefinite period with a charge hanging over him; and charge was groundless.

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[24] In the upshort of the case, I find thereare special reasons and valid grounds for the discharge and acquittal order. The case was left hanging over the appellant's mind for quite sometime and there is no evidence that the prosecution had decided to prosecute the case within a reasonable time. By virtue of the above reasons I had no hesitation to allow this appeal and the appellant being discharge amounting to an acquittal (DNA).

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Appeal allowed and appellant acquitted and discharged of the criminal charge.

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Reported by Ashok Kumar

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